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RESPONSE FROM THE COMMITTEE ON THE ADMINISTRATION OF JUSTICE (CAJ) TO THE REPORT OF A FUNDAMENTAL REVIEW OF THE INQUEST SYSTEM (LUCE REVIEW)

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What is the Committee on the Administration of Justice (CAJ)?

CAJ is an independent non-governmental organisation, which is affiliated to the International Federation of Human Rights (IFHR). CAJ monitors the human rights situation in Northern Ireland and works to ensure the highest standards in the administration of justice. We take no position on the constitutional status of Northern Ireland, seeking instead to ensure that whoever has responsibility for this jurisdiction respects and protects the rights of all. We are opposed to the use of violence for political ends.

CAJ has since 1991 made regular submissions to the human rights organs of the United Nations and to other international human rights mechanisms. These have included the Commission on Human Rights, the Sub-Commission on the Promotion and Protection of Human Rights, the Human Rights Committee, the Committee Against Torture, the Committee on the Rights of the Child, the Committee on the Elimination of Racial Discrimination, the Special Rapporteurs on Torture, Independence of Judges and Lawyers, Extra judicial, Summary and Arbitrary Executions, and Freedom of Opinion and Expression, the European Commission and Court of Human Rights and the European Committee on the Prevention of Torture.

CAJ works closely with international NGOs including Amnesty International, the Lawyers Committee for Human Rights, Human Rights Watch and the International Commission of Jurists.

Our activities include: publication of human rights information; conducting research and holding conferences; lobbying; individual casework and legal advice. Our areas of expertise include policing, emergency laws, criminal justice, equality, and the protection of rights.

Our membership is drawn from all sections of the community in Northern Ireland and is made up of lawyers, academics, community activists, trade unionists, students, and other interested individuals.

In 1998 CAJ was awarded the Council of Europe Human Rights Prize in recognition of its work in defence of rights in Northern Ireland. Previous recipients of the award have included Medecins Sans Frontieres, Raoul Wallenberg, Raul Alfonsin, Lech Walesa and the International Commission of Jurists.

We acted as lawyers for the applicants in the Kelly et al, Shanaghan and McShane cases before the European Court of Human Rights.

INTRODUCTION

CAJ have been active on the issue of inquests for many years. Our first publication on this issue was in 1990 and provided a critique of the system and recommendations for change. Our focus has predominantly related to deaths caused by the security forces or where there have been allegations of collusion but we have also provided advice and assistance in a range of other cases.

We have long been of the view that the inquest system in Northern Ireland in particular is in need of serious and far-reaching change in respect of its powers and functions. From the perspective of those families we have worked with over the course of the last twenty years the inquest system has not only failed to address the concerns they may have about their loved one's death but it has in fact often compounded the sense of injustice and loss which they already feel.

The starting point for our critique of the system has been the extent to which it does not conform with international human rights standards, - the European Convention on Human Rights, the International Covenant on Civil and Political Rights and other "soft law" international standards. In the mid and late 1990s we were approached by a number of families who had just completed their inquests and were at a loss as to how to proceed. We advised them to take their cases to the European Court of Human Rights arguing that the UK had violated the procedural aspect of article 2 of the Convention guaranteeing an adequate ex post facto investigation of a killing involving the state. We lodged the cases in Strasbourg and acted as lawyers for the families before the Court, culminating in the successful judgements of Kelly et al v UK, Shanaghan v UK and more latterly McShane v UK.

The cumulative effect of these judgements in our view obliges the UK government to completely overhaul the way in which these cases are investigated. The judgements are of course not restricted to the issue of inquests. They involve the police, the Director of Public Prosecutions, and the police complaints system. However, it is equally clear that major change must occur within the coronial system in Northern Ireland in order to ensure that it complies with article 2, which of course is now domestic legislation by way of the Human Rights Act.

In this context we welcome the work of the Luce Review. We particularly welcome the extent to which the Review has placed article 2 concerns at the centre of its considerations. We also welcome the recognition by the Review that article 2 does not just impact on inquests but has significant implications for other agencies, including the DPP.

SCOPE OF THE INQUEST

In our submission to the Luce Review we highlighted comments of the European Court of Human Rights in the decision of *Shanaghan v United Kingdom*[1], specifically criticising the fact that the scope of the examination of the Inquest excluded the family's concern about alleged collusion by security force personnel in the targeting and killing of Patrick Shanaghan:

> The domestic courts appeared to take the view that the only matter of concern to the inquest was the question of who pulled the trigger, and that, as it was not disputed that Patrick Shanaghan was the target of loyalist gunmen, there was no basis for extending the enquiry any further into issues of collusion. Serious and legitimate concerns of the family and the public were therefore not addressed by the inquest proceedings.

In the case of *McKerr v United Kingdom*[2]*:*

> Serious concerns arose from these three incidents as to whether police counter-terrorism procedures involved an excessive use of force, whether deliberately or as an inevitable by-product of the tactics that were used. The deliberate concealment of evidence also cast doubts on the effectiveness of investigations in uncovering what had occurred.

Therefore, the Court concluded that, notwithstanding the existence of a criminal trial running parallel with the Inquest, Article 2 may require a wider consideration of the possibility of excessive use of force by the security forces. The Court went beyond the dicta of the domestic Courts by looking to the underlying objective of the inquest, that of re-assuring the public and the members of the family as to the lawfulness of the killings. It concluded that due to the fact that such a purpose had not been accomplished by the criminal trial, the positive obligations inherent in Article 2 required an adequate procedure whereby such doubts could be addressed[3].

In cases like that of *McCann v United Kingdom*[4] it is clear that issues relating to the planning and control of the operation which leads to the death must be included within the scope of the inquest. Indeed, the Coroner for Belfast in the Jordan case has now accepted, as a matter of principle that such matters lie within the proper scope of the inquest[5].

The investigation must focus upon (a) not only those who were allegedly directly responsible for the death, but (b) the planning and organisation of the state agency or operation that provided the context in which the deaths took place and any systemic

[1] Paragraph 111, Application No. 37715/97, Judgment of 4 May 2001
[2] Paragraph 137, Application No. 28883/95, Judgement of 4 May 2001.
[3] Id.
[4] Series A no. 324, Judgment of 27 September 1995
[5] See Treacy, Seamus, *Article 2 and the Future of Inquests in Northern Ireland: A Practitioner's Perspective,* (Transcript from CAJ and British Irish Rights Watch, Inquest Seminar dated 23 February 2002)

deficiencies therein[6] Where appropriate it must also indicate those who were responsible.[7]

A number of recommendations in chapters 8, 10 and 17 are relevant in this regard. While they go some way to meeting the concerns articulated above, we are not convinced that the key recommendation on scope contained in chapter 8, would allow a sufficiently rigorous examination of the death to satisfy article 2 concerns. It may well be that this matter has to be addressed on a case by case basis but it is our firm view based on the article 2 jurisprudence that any inquest dealing with alleged article 2 violations must have the ability to examine the planning and organisation of the state agency or operation that provided the context in which the deaths took place and any systemic deficiencies therein. This must form the basis of the government response to the Luce Review in this regard and future inquests raising article 2 issues must operate in this way.

[6] *Andronicou and Constantinou v Cyprus*, Reports 1997- VI, *McCann and Others v. the United Kingdom*, Series A no. 324, Judgment of 27 September 1995

[7] *Jordan v United Kingdom*, Application No. 24746/94, Judgement of 4 May 2001, *Ögur v. Turkey*, Paragraph 88, Judgement of 20 May 1999, Application no. 21594/93

ADJOURNMENT/ DELAY

In our submission to the Luce Review we argued that the inquest should not be postponed until completion of the criminal trial unless prosecuting authorities are able to commence proceedings within a few months of the investigation. If adjourned it should only be if charges are serious and if the DPP can satisfy the Coroner that it is in the interests of justice to adjourn[8]. The situation in the State of New South Wales in Australia is an effective model to look to. An adjournment will only be granted whereupon a *prima facie* case for an indictable offence has been established to the satisfaction of the Coroner.

The Luce Review has proposed a limited but welcome change in this regard in that they recommend that the practice in England and Wales of opening the inquest and then adjourning pending investigation and trial be followed in Northern Ireland. We believe that unless more is done in relation to this matter the problem of delay will not be solved. We still hold to the merit of the recommendation made by us above. Another model would involve hearings being convened by the Coroner to determine if the time was right for an inquest to be held at which all of the parties including the family could be represented. In addition time limits for completion of investigations could be set.

However, the other major problem affecting the inquest system in Northern Ireland at the moment is the delay caused by government's failure to deal promptly and fully with the implications of the article 2 judgements. Again the recommendation from Luce in this regard is limited although welcome. We believe, from discussions with Coroners, that the problem is not simply one of resources but springs primarily from legal uncertainty surrounding article 2 and its implications. We recommend that immediate steps should be taken to resolve this matter. For instance, new independent investigations could be ordered in relevant cases in preparation for inquests. Coroners could be instructed to hold inquests in line with article 2 and disregard any incompatible secondary legislation. The DPP could be encouraged to "back date" his new undertaking on reasons in article 2 cases. One thing is certain, the current delay is violating article 2 rights of family members on a daily basis.

[8] See Jennings, Anthony, *The Death of an Irish Inquest*, New Law Journal 4 May 1990

COMPELLABILITY

The position in Northern Ireland with regard to the non-compellability of key witnesses was specifically criticised in the decision of *Jordan v United Kingdom*[9] at Paragraph 127:

> In inquests in Northern Ireland, any person suspected of causing the death may not be compelled to give evidence (Rule 9(2) of the 1963 Coroners Rules, see paragraph 68 above). In practice, in inquests involving the use of lethal force by members of the security forces in Northern Ireland, the police officers or soldiers concerned do not attend. Instead, written statements or transcripts of interviews are admitted in evidence. At the inquest in this case, Sergeant A informed the Coroner that he would not appear. He has therefore not been subject to examination concerning his account of events. The records of his two interviews with investigating police officers were made available to the Coroner instead (see paragraphs 19 and 20 above). This does not enable any satisfactory assessment to be made of either his reliability or credibility on crucial factual issues. *It detracts from the inquest's capacity to establish the facts immediately relevant to the death, in particular the lawfulness of the use of force and thereby to achieve one of the purposes required by Article 2 of the Convention* (see also paragraph 10 of the United Nations Principles on Extra-Legal Executions cited at paragraph 90 above).

The Court also makes reference to the 'soft law' UN United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions[10], Principle 10 of which states that:

> The investigative authority shall have the power to obtain all the information necessary to the inquiry. Those persons conducting the inquiry ... shall also have the authority to oblige officials allegedly involved in any such executions to appear and testify.

In light of the European Court of Human Rights, the Lord Chancellor has since amended Rule 9. The amended Rule 9 reads as follows:

> 9(1) No witness at an inquest shall be obliged to answer any question tending to incriminate himself or his spouse
>
> 9(2) Where it appears to the coroner that a witness has been asked such a question, the Coroner shall inform the witness that he may refuse to answer the question

[9] Application No. 24746/94, Judgement of 4 May 2001
[10] Adopted on 24 May 1989 by the Economic and Social Council Resolution 1989/65

While we welcome the changes in relation to non-compellability, we are concerned that the continued existence of the right against self-incrimination will undermine the changes in that police officers and soldiers will refuse to answer any questions relating to the actual killings or indeed the planning of the security operation which led to the deaths.

We suggested to the Luce review that there were alternative ways in which the rights of soldiers and police officers can be protected while still ensuring the integrity of the fact finding nature of the inquest. For instance, soldiers giving evidence to the Saville inquiry have been guaranteed that their evidence will not be used against them in any subsequent trials. We believe that this approach should be adopted in relation to article 2 inquests.

We are glad to see therefore that this option has been specifically recommended by the Luce Review in chapter 9.

EVIDENCE

In our submission to the Luce Review we argued that in light of the European jurisprudence and in the general interest of procedural fairness interested parties should have access to all statements in the Coroners File before the inquest, whether or not the coroner intends to call the maker of the statement. The advantages in such a practice are clear:

- Equality of arms arguments would be addressed.
- It would assist the inquisitorial role of the inquest as cross examination will be shorter and to the point and independent experts could testify on disputed evidence
- It would result in smoother administration of justice in that it would lead to fewer requests to adjourn
- It saves public money due to fewer judicial review cases

In addition we also argued that interested parties should have the right to require the coroner to call witnesses. This proposal is in line with the position adopted in Scotland. Additionally, interested parties should be entitled to address the court on the facts.

It appears to us that there are two levels to the issue of disclosure – to the Coroner and also to interested parties including of course the family of the deceased.

In relation to the first level, disclosure to the Coroner, the Luce Review makes clear in chapter 7 that the Coroner should have the power to

> *"obtain any document, statement, report or other material for such investigations from any source, subject only to any public interest immunity exclusions that might be claimed in individual cases; and enter any premises for purposes relevant to the proper investigation of a death."*

In relation to the issue of disclosure to others, a relevant recommendation contained in chapter 9 states:

> *"We recommend that the new Rules Committee should devise a set of rules on disclosure which reflect a presumption in its favour but contain such safeguards or limitations as can be shown to be necessary for the effectiveness of other essential investigations and legal processes such as prosecutions. The rules should contain safeguards against improper use of the material and should prohibit any approaches to its authors or people named in it."*

We are concerned however that the combination of these two recommendations seems to be significantly weaker than the recommendation contained in the legal opinion obtained by the Review from Tim Owen QC who concluded on the issue of disclosure to interested parties that articles 2, 3 and 8 require a "system of mandatory pre-inquest disclosure" to "secure substantial compliance with the Convention".

Our experience is that a mandatory system such as that proposed by Tim Owen is necessary for both levels of disclosure. In a series of cases which are currently at

hearing in Tyrone the PSNI and the Ministry of Defence have refused to disclose documents to the Coroner. Given this institutional resistance to disclosure to a judicial officer we fail to see how anything less than a mandatory system will work effectively in Northern Ireland. We therefore agree with the Owen opinion and would urge government to institute such a system immediately both in terms of disclosure to Coroners and also to families.

We also argued in our submission to Luce that in relation to PIIs the balance should be in favour of disclosure. In the event that a PII is issued or being considered the situation in relation to Coroners should be the same as obtains in criminal cases under the judgement of *ex parte Wiley*. We can see no evidence that Luce addressed this issue but we do note comments in the UK's submission to the Committee of Ministers in Strasbourg which implicitly suggest this is the practice which will be followed. Although PIIs have not been issued in the Tyrone cases nevertheless the indications from those cases are completely contrary to the course which the UK has indicated it is going to undertake. We believe this matter needs immediate clarification and it should be made clear that all government agencies will operate according to the *Wiley* decision in future and ongoing inquests.

INDEPENDENCE OF THE INVESTIGATION

In our submission to Luce we acknowledged that the establishment of the Police Ombudsman's office went some way to satisfying the article 2 concerns on independence of investigations. We recommended that Coroners should receive investigation files from the Police Ombudsman in appropriate cases. We are therefore glad to see the recommendation from Luce in chapter 17 of the report that any legal uncertainty on the Police Ombudsman's investigators assisting the Coroner should be removed. We believe this should be done as a matter of urgency.

However, in light of the EctHR judgements in Kelly and McShane we also argued that a new independent investigatory mechanism should be established to examine cases of army killings. It is likely in our view that prison deaths or other deaths "in the arms of the state" will raise article 2 concerns if they are investigated by the police. It is not clear if the Police Ombudsman's remit could be extended to deal with such cases but it is clear that if the PSNI continue to investigate them, there will be further violations of article 2 by the state. This is an unacceptable state of affairs and immediate steps need to be taken to deal with them. We are disappointed that Luce did not appear to make relevant recommendations in this area.

Similarly no recommendation has been made which directly relates to a situation involving collusion by the security forces in a death. Given the Shanaghan judgement it is clear that such a death should also trigger an independent investigation. While the Police Ombudsman could investigate such a death where the allegations centred on the police, it remains the case that they could take no action where army misbehaviour was alleged.

It also remains our view that in outstanding cases in Northern Ireland which raise article 2 issues and where the investigation was carried out by the RUC or the PSNI, new independent criminal investigations must be carried out.

VERDICTS

Our view has been that the article 2 jurisprudence made it abundantly clear that the law must be changed to allow inquests in Northern Ireland to arrive at verdicts. We are attracted by the Review's suggestion of "narrative" verdicts outlining why the jury has come to a particular conclusion.

However, we are concerned that such verdicts should have the capacity to make statements about whether the death could have been avoided and whether institutional failures contributed to the death. The Luce report does suggest that this will be the case when it suggests that the outcome of the inquest should be

> *"primarily a factual account of the cause and circumstances of the death, an analysis of whether there were systematic failings which had they not existed might have prevented it, and of how the activities of individuals bore on the death. The analysis should in suitable cases examine whether there was a real and immediate risk to life and whether the authorities took, or failed to take, reasonable steps to prevent it."*

We are concerned however that the Review has suggested the removal of verdicts. We believe it is important (and indeed legally necessary) that in article 2 cases, juries are allowed to reach verdicts of unlawful killing.

RECOMMENDATIONS BY THE CORONER

We are disappointed with the relevant recommendations made by the Luce Review in this regard. Essentially those recommendations (contained in chapters 10 and 17) restate the current position in that the Coroner will forward his/her recommendations for change to the relevant agency which would then be responsible for change and subject to current process of judicial review challenge. This is not in our view a sufficient response to the challenges of article 2. We believe in these circumstances that:

- the Coroner should publicly indicate what he/she is doing and why;
- the recipient body should publicly indicate what steps it is going to take to meet the concerns raised;
- there should be a legal obligation on the recipient body to report back to the Coroner once they have completed whatever work they have undertaken;
- the Coroner should issue a public statement to the effect that this has been done.
- the family of the deceased should be notified of all of these steps.

OTHER POINTS

In light of the recent decision of the House of Lords in the *Amin* case, it is clear that there are a number of cases in Northern Ireland which also need to be resolved by way of an article 2 compliant inquiry. In our submission these clearly include those cases which were the subject of the judgements from the European Court of Human Rights in May 2001 and also the McShane case. There are however many others. We believe government needs to be begin to take steps to address this issue energetically in light of *Amin*.

We agree with the recommendation of the Review in chapter 7 that a public judicial inquest should be held in all cases involving the death of a person held in custody. We do not agree however with the qualification added by the Review that inquests do not have to be held in cases where the Statutory Medical Assessor certifies that the death was beyond reasonable doubt caused by natural disease. We believe that if an individual dies in "in the arms of the state" then there should be an inquest.